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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 United States of America,
10 Plaintiff,

11 v.

12 Michael Lacey - 001
13 James Larkin - 002
14 Scott Spear - 003
15 John Brunst - 004
16 Andrew Padilla - 006
Joye Vaught - 007,
Defendant.

No. CR-18-00422-001-PHX-SMB
ORDER

17 Pending before the Court is Defendant John Brunst's Motion to Compel
18 Government Compliance with Court's Order for Specific Identification of Documents
19 Subject to Protective Order.¹ (Doc. 740, "Motion.") The Government responded, (Doc.
20 767), and Defendant replied, (Doc. 771). The Court issues the following Order:

21 **I. BACKGROUND**

22 This dispute arises out of two Court Orders relating to the public disclosure of
23 sensitive documents and materials subject to the Jencks Act ("Jencks Act materials").² (*See*
24 Docs. 730, 731.) The Court summarizes the Orders and parties' relevant conduct before
25 addressing the Motion.

26
27 ¹ Defendants Scott Spear, James Larkin, Andrew Padilla, Michael Lacey join the Motion.
(Docs. 741, 743, 745, 747.)

28 ² The parties do not dispute whether specific documents are Jencks Act materials. Rather,
they dispute whether certain documents, presumably covered by the Jencks Act, can be
publicly disclosed.

1 **A. Protective Order**

2 On August 20, 2019, the Court ordered the Government disclose “any Jencks Act
3 [materials]³ not previously disclosed.” (Doc. 730 at 1, “Protective Order.”) The Court
4 further ordered Jencks Act materials may only be used “in connection with the defense of
5 this case” and “for no other purpose, and in connection with no other proceedings, without
6 further order of this Court.” (*Id.*) Copies of Jencks Act materials are not authorized. (*Id.* at
7 2.) Moreover, “Defendants . . . shall not disclose the [Jencks Act materials] or their
8 contents” either “[d]irectly or indirectly to any person or entity other than persons
9 employed to assist in the defense, persons who are interviewed as potential witnesses,
10 counsel for potential witnesses, and other persons to whom the Court may authorize
11 disclosure [(“authorized persons”).]” (*Id.* at 1-2.) Defendants must provide authorized
12 persons with a copy of this Protective Order. (*Id.* at 2.)

13 **B. Protective Order’s Interpretation**

14 On August 26, 2019, the Court interpreted the Protective Order upon Defendants’
15 request. (Doc. 731, “Interpretation.”) The Interpretation explicitly states the Protective
16 Order “applies ‘on a going-forward basis’ to all Jencks Act materials, not just those
17 disclosed on August 20, 2019.” (*Id.* at 1.) Moreover, the Protective Order’s disclosure
18 restrictions do not apply to the government. (*Id.* at 1.) Last, the Interpretation orders the
19 Government to “provide a list [(“the List”)] of Jencks Act material[s] disclosed and that it
20 considers to be part of [the Protective Order] by September 3, 2019.” (*Id.* at 2.) “The [List]
21 should,” the Court ordered, “include enough identifying information so [Defendants] can
22 locate and separate the materials subject to [the Protective Order].”⁴ (*Id.*)

23 **C. Government’s Notice of Compliance**

24 On September 3, 2019, the Government filed a Notice of Compliance with Doc. 730
25 and Doc. 731 after providing Defendants the List of Jencks Act materials. (Doc. 733; *see*
26 *generally* Doc. 740-1.) Specifically, the List contains two parts:

27 ³ “Jencks Act materials,” per the Protective Order, includes “[any] materials provided by
28 the United States in preparation for, or in connection with, any stage of the proceedings in
this case.” (*Id.*)

⁴ The Court did not order Bates numbers disclosed. (*Id.*)

1 First . . . is an excel spreadsheet identifying Jencks Act materials where each
 2 document is identified by witness, a short description of the document, and
 3 its Bates stamp. Second . . . the government incorporates by reference its
 4 August 20, 2019 letter entitled ‘*Jencks Act Disclosure: Carl Ferrer*.’ This
 5 letter lists the date and number of pages for each Memorandum of Interview,
 6 a disk containing reference materials, as well as a May 23, 2019, declaration
 7 from Brian Fichtner, with supporting video exhibits.

8 (*Id.* at 3) (emphasis in original). The Government also stated it will provide additional
 9 Jencks Act materials as “victims and witnesses review and adopt their statements.” (*Id.*)

10 **D. September 13, 2019 Hearing**

11 On September 13, 2019, the Court stated it is “not willing to remove from [the
 12 Protective Order] anything other than to say publicly available information.” (Doc. 767-1
 13 at 6.) The Court further told Defendants: “If there is something else that should be removed
 14 from the [Protective] [O]rder, then . . . you need to file something specific with that
 15 designation so [the Court] can make that determination.” (*Id.*) As they again argue in this
 16 Motion, Defendants argued at the hearing that the Government “should tell [Defendants]
 17 what needs to be protected.” (*Id.* at 8.) The Court responded: “They just did. You disagree
 18 with it.” (*Id.*) The Court further explained: “[I]f you want anything more specific than
 19 things that are public are not protected . . . all you need to do is send [the Court] a list with
 20 your motion saying this is what I don’t think should be protected and here’s why.” (*Id.* at
 21 10.) Defendants replied: “[U]nderstood, and we can do that. We can provide the specifics
 22 to the Court after we confer with the government further.” (*Id.*)

23 **E. Post-hearing Dispute About Meaning of “Publicly-Available”**

24 The parties began discussions about what should be excluded from the Protective
 25 Order after the hearing. On September 15, 2019, the Government clarified which
 26 documents it agreed are excluded from the Protective Order because they are publicly
 27 available.⁵ (Doc. 740-1 at 30.) Two days later, Defendants responded disputing whether

28 ⁵ A “publicly available document” is one obtained outside of this Court’s discovery process.

1 certain materials are publicly available. (*Id.* at 28-29.)

2 On September 23, 2019, the Government again clarified which materials it agreed
3 are excluded from the Protective Order but disputed Defendants’ assertion that identified
4 emails are publicly available. (*Id.* at 27) (“If a document is publicly-available then we don’t
5 believe it’s subject to the protective order.”) In addition, the Government explained the
6 extent to which certain documents are publicly available. (*Id.*)

7 On September 24, 2019, Defendants filed this Motion requesting the Court order
8 the Government to specifically identify documents it believes are subject to the Protective
9 Order. (Doc. 740 at 6.) Alternatively, Defendants request the Court remove the Protective
10 Order. (*Id.*) The Court denies Defendants’ Motion.

11 **II. LEGAL STANDARD**

12 Federal Rule of Civil Procedure 26(c) provides that a “court may, for good cause,
13 issue an order to protect a party or person from annoyance, embarrassment, oppression, or
14 undue burden or expense, including . . . forbidding the disclosure . . . [and] prescribing a
15 discovery method other than the one selected by the party seeking discovery.” Fed. R. Civ.
16 P. 26(c)(1)(A), (C). “It is well-established that the fruits of pretrial discovery are, in the
17 absence of a court order to the contrary, presumptively public. Rule 26(c) authorizes a
18 district court to override this presumption where ‘good cause’ is shown.” *San Jose Mercury*
19 *News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1103 (9th Cir. 1999) (citations omitted).

20 A protective order under Rule 26(c) is appropriately granted when the requesting
21 party makes a “particularized showing of good cause with respect to [each] individual
22 document.” *San Jose Mercury News*, 187 F.3d at 1103. In other words, “the party seeking
23 protection [must show] specific prejudice or harm will result if no protective order is
24 granted.” *Phillips*, 307 F.3d at 1210-11; *see also In re Roman Catholic Archbishop of*
25 *Portland in Or.*, 661 F.3d 417, 424 (9th Cir. 2011) (“The party opposing disclosure has the
26 burden of proving ‘good cause.’”), *cert. denied*, 132 S. Ct. 1867 (2012). “[B]road
27 allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not
28 satisfy the Rule 26(c) test.” *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 476 (9th

1 Cir. 1992). “The law . . . gives district courts broad latitude to grant protective orders to
 2 prevent disclosure of materials for many types of information.” *Phillips*, 307 F.3d at 1211.
 3 In fact, the Supreme Court has interpreted Rule 26(c) to confer “broad discretion on the
 4 trial court to decide when a protective order is appropriate and what degree of protection
 5 is required.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). But “good cause” is
 6 nevertheless required. *San Jose Mercury News*, 187 F.3d at 1103.

7 **III. DISCUSSION**

8 Defendants move to compel the Government to “specifically identify documents –
 9 by title and Bates number – that it contends are subject to the protective order.” (Doc. 740
 10 at 6.). Alternatively, Defendants move for removal of the Protective Order. (*Id.*)
 11 Defendants do not argue that they have not received a list of documents subject to the
 12 Protective Order.

13 **A. Good Cause Exists for the Protective Order.**

14 As a preliminary matter, Defendants do not challenge whether the Government has
 15 shown good cause exists for the Protective Order. Nevertheless, the Court finds good cause
 16 still exists in light of recent disclosures of the Government’s internal memoranda.⁶ While
 17 “broad allegations of harm, unsubstantiated by specific examples or articulated reasoning,
 18 do not satisfy the Rule 26(c) test,” *Beckman Indus.*, 966 F.2d at 476, the Government has
 19 provided concrete examples of pretrial disclosures. Requiring the Government to predict
 20 precise harm for each Jencks Act material or other sensitive document’s disclosure is
 21 unnecessary under Rule 26(c)’s test where similar harms are present for any disclosure.

22 Again, and most importantly, the Protective Order’s instructions for public
 23 disclosure do not prevent Defendants’ receipt or use of discovery. Rather, they prescribe
 24 reasonable restrictions for Defendants’ *public disclosure* of materials. These procedures
 25 are appropriate considering the importance of protecting the integrity of this Court’s
 26 judicial processes. Not only does the Court find good cause for these simple measures,
 27 especially considering disclosure of sensitive materials has already occurred, but they in

28 ⁶ The Government cites two recent publications of its internal memoranda with Bates
 numbers in their entirety. (Doc. 767 at 2 n.1.)

1 no way inhibit Defendants' trial preparation. "[Rule 26(c)] allows a court to deny discovery
 2 altogether. In the instant case, the order does not go so far, for it allows plaintiffs to obtain
 3 information." *Curley v. Cumberland Farms Dairy, Inc.*, 728 F. Supp. 1123, 1141 (D. N.J.
 4 Dec. 29, 1989). "In fact, the order does no more than set forth a procedure by which the
 5 parties may present a dispute concerning the confidentiality of information." *Id.* In fact,
 6 these Court ordered assurances, by way of procedures relating to public disclosure,
 7 expedite discovery.

8 Having found good cause exists for the Protective Order, the Court turns to
 9 Defendants' Motion as it relates to compelling the Government to specifically identify
 10 documents subject to the Protective Order.

11 **A. Materials Subject to the Protective Order Are Already Identified.**

12 Defendants request the Government specifically identify each document subject to
 13 the Protective Order. (Doc. 740 at 3.) Without knowing which documents are subject to
 14 the Protective Order, Defendants argue they are "unable to evaluate the propriety of the
 15 government's designations (or comply with the Court's Order)." (*Id.* at 4-5.) More
 16 precisely, Defendants claim the "category of 'non-public' documents . . . needs further
 17 elucidation and . . . [t]he defense should not be left to guess, or be forced to consult with
 18 the government before copying a document, showing it to a potential witness, or otherwise
 19 doing something that could result in an unwitting violation of the Protective Order." (Doc.
 20 771 at 3-4.) In essence, Defendants argue the Government bears the burden of identifying
 21 documents subject to the Protective Order. (*Id.* at 2.)

22 On the other hand, the Government argues the Motion should be denied because it
 23 has already provided a list of materials subject to the Protective Order. (Doc. 767 at 3)
 24 (citing Doc. 740-1 at 3-5.) Moreover, the Government claims another list would be
 25 unnecessary because the Court already interpreted the Protective Order's scope. (Doc. 767
 26 at 2.) Specifically, it argues the Court already specified "that the [sic] Protective Order
 27 regarding Jencks Act material [is limited] to 'an interview memorandum of Carl Ferrer, all
 28 civil discovery material that remains under the Protective Order and other Jencks Act

1 materials not publicly available.” (*Id.*) (quoting Doc. 737 at 2). The Government
2 highlights the Court’s unwillingness “to remove from [the Protective Order] anything other
3 than . . . publicly available information,” (Doc. 767 at 2) (quoting 767-1 at 6), as well as
4 the Court’s prescribed dispute process for Defendants: “[I]f there is something [besides
5 publicly available information] that should be removed from the protective order, then . . .
6 [Defendants] need to file something specific with that designation so [the Court] can make
7 that determination.” (Doc. 767 at 3) (quoting Doc. 767-1 at 6). The Court agrees that
8 requiring the Government to provide another list is unnecessary. The Government has
9 already provided it’s position concerning which materials are protected.

10 The Court stands by the Protective Order’s straightforward instructions. First, the
11 Government provides Defendants materials it believes are subject to the Protective Order.
12 If Defendants believe something should be excluded from the Protective Order, as seems
13 to be their primary concern here, (Doc. 740-1 at 11), then they must confer with the
14 Government and file a specific objection with the Court stating why they should be able to
15 disclose it. Only then will the Court determine whether disclosure is appropriate. Instead
16 of complying with the Court’s instructions, Defendants ask the Court to reconsider them.
17 The Court declines.

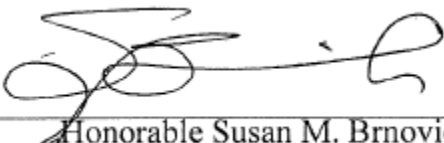
18 IV. CONCLUSION

19 The Court finds that the Government has complied with the Court’s Order by
20 providing Defendants a list of twenty-six (26) documents identified by description and
21 Bates numbers. Defendants properly discussed areas of disagreement with the
22 Government. The Government agreed with some of Defendants’ arguments but disagreed
23 with others. If there is still a dispute, the proper procedure is to ask the Court to find that
24 certain items are publicly available.

25 Accordingly,

26 **IT IS ORDERED** that Defendants’ Motion, (Doc. 740), is **DENIED**.

27 Dated this 13th day of November, 2019.

28


Honorable Susan M. Brnovich
United States District Judge